WAGE THEORIES IN INDUSTRIAL ARBITRATION

Labor disputes in modern industry may be divided generally into those which involve wages and those which involve a principle. A principle can not be arbitrated. If it is arbitrated it ceases to be a principle. To submit it is to surrender it. There is therefore a distinct category of industrial disturbances that are not susceptible of adjustment by any method which denies to the disputants the direct participation in the settlement. But the great group of labor differences, in which principle is not involved, may be adjusted, when other peaceful means fail, through intervention of a third party. The principle of industrial arbitration is an assumption that all disputes involving wages are capable of adjustment if undertaken in proper time. The meager experience of the United States and the broader experience of other countries have promised to find in the intervention of an arbitrator clothed with definite powers of adjudication a vigorous aid to the maintenance of industrial peace. The distinctive principle of arbitration which in the practice of a quarter of a century ago was an experimental social novelty has received, in some form, almost world-wide acceptance. And the day is far from prospering the culture of the methods of peace.

A judgment of the validity of the wage theories underlying the methods of industrial arbitration must reflect one's conception of the place of the individual man in the scheme of economics. Is the man himself the end of economic activity or a means to the end, a factor of production? The first concept incorporates the idea of social welfare; the second involves a doctrine of individual self-interest: Let survive him who can. The theoretical defenses of industrial arbitration, as I propose to review them, have been usually in terms of social welfare or of public policy. In the scientific criticisms there has been evident, on the other hand, an essentially individualistic, competitive conception—one which speaks not the language of general immediate social interest but rather that of the competing entrepreneur to whom wages are only an item of cost, to whom labor appears more or less impersonal. Of this general distinction, which is by no means without exception, there is ample evidence in arbitration precedents.

The two ideals of distributive justice, one social, the other

individual, have not always—or even, perhaps, usually—coincided. The aim of this paper is to suggest a judgment of the validity of wage theories in arbitration as a part of a unified *theory of distribution.* To this end it is well to examine the actual precedents as they are to be found in the different industrial communities. It is necessary therefore, for science, to consider wages as the individual enterpriser in the business world views them. But whether or not a strictly economic justification for wage arbitration can be found is not finally indicative of its proper place in the scheme of modern social legislation. Ulterior social considerations may and often do, in a dynamic economy, far outweigh those that are purely economic. When the fundamental conditions of economic life are in rapid and continuous flux, ideal schemes must sometimes be held in abeyance in favor of immediate remedial expedients.

To the term "industrial arbitration," unfortunately, no uniform meaning is attached. Generically it denotes the intervention of a third party to aid in the settlement of disputes between employers and employees. In this sense it includes mediation of whatever kind, conciliation and arbitration in the narrower and now the most generally accepted sense, in which it is used in this paper: namely, the determination of an industrial dispute by a third party independent of direct participation by the immediate disputants. Mediation and conciliation are merely refined methods of collective bargaining.

Moreover, arbitration may be voluntary or compulsory. Both the reference of the dispute to an arbitrator and the acquiescence in the terms of his award may be voluntary; or the reference may be voluntary and the award compulsory; or both the reference and the award may be compulsory. It is only arbitration providing for decree binding upon the disputants with which we are concerned. Arbitration with voluntary award is a whim. An award unsatisfactory to either party becomes binding upon neither.

Sidney and Beatrice Webb say: "The essential feature of arbitration as a means of determining the conditions of employment is that the decision is not the will of either party, nor the outcome of negotiations between them, but the fiat of an umpire or arbitrator."[1] To some the statement will not be acceptable

[1] *Industrial Democracy,* vol. I, p. 222.

that conciliation is simply the collective bargain in a more polite and usually a more effective form. Many competent critics, moreover, see in the processes of intermediation the promise of the ultimate future maintenance of industrial peace. To some, indeed, the implication that agreement between the owner of the instruments of production and the organized group of laborers seeking employment will continue to be by "higgling" or by the "long jaw" is even offensive. These latter terms have not had a connotation uniformly synonomous with peace in industrial relations. Whatever be our sentimental attachment to words, it is nevertheless obvious that the fundamental distinction between the judicial types of industrial settlements is the distinction between collective bargaining on the one hand and the complete substitution of collective bargaining on the other hand. Conciliation means peaceful mediation with the power of ultimate settlement residing still with the two parties to the issue. Arbitration is inconsistent with bargaining: the power of settlement resides in the third party; the terms must be obligatory upon the disputants. Fundamentally, the distinction is not between conciliation and arbitration but between bargaining and adjudication.

It is not my purpose to estimate the relative efficacy of each of the judicial methods of industrial peace. From the standpoint of social policy, conciliation is a convenient and often a very effective means of securing a meeting between a supercilious, often relentlessly independent employer, and the willing representatives of a union of employees; or between the representatives of a clamorous and often vindictive and unreasonable union and a willing employer. But all this has to do only with the way in which the machinery of collective bargaining is set in motion. There is implied no distinct wage theory. Not so in the case of arbitration. There the customary methods of wage determination are abolished. The essential characteristic is the binding award rendered[2] not by the immediate parties but by a supposedly impartial third party.

The word arbitration makes an initial sentimental appeal. It speaks the language of distributive justice; it calls for the acme of fairness between men. But practically it is doubtful

[2] Until within approximately the past 25 years the principle of arbitration compulsory by law was practically unknown. Its most elaborate trial has been in Australasia, the modern laboratory of democratic social experimentation.

whether the arbitrator of an industrial dispute can convince even himself of what is justice in any particular case. Equity is unluckily not self-determining. With how much the more difficulty will he satisfy the rival claimants! In the historical development of arbitration practice no criterion of justice has been generally accepted other than the vague admission that the award must not be "contrary to public welfare."[3] The perplexity of an experienced, fair-minded arbitrator is illustrated in Judge Ellison's determination of a wage dispute in the Yorkshire Coalminers' case in 1879:[4]

> It is for [the employers' advocate] to put the men's wages as high as he can. It is for [the men's advocate] to put them as low as he can. And when you have done that it is for me to deal with the question as well as I can. But on what principle I have to deal with it I have not the slightest idea. There is no principle of law involved in it. There is no principle of political economy in it. Both masters and men are arguing and standing upon what is completely within their rights. The master is not bound to employ labor except at a price which he thinks will pay him. The man is not bound to work for wages that won't subsist him and his family sufficiently, and so forth. So that you are both within your rights. . . .

The rapid development of trade unionism during the period from the forties to the seventies, especially in Great Britain, and the formation of employers' associations to combat the rising tide, early resulted in the development of irregular negotiations administered largely through strikes. In many industries were instituted so-called arbitration proceedings such as that cited in the above illustration. But for many years much of the arbitration was concerned with voluntary award, essentially resembling conciliation. Where arbitration practice prevailed no formula or consistent theory of wages was ever recognized to guide the determination. In the Northumberland Coalminers' Arbitration case, for example, in 1875, the operators demanded a 20 per cent reduction in wages. Their plea was based on the rapid decline in coal prices since 1871, evidenced by "impartial" data drawn from the operators' accounts. Despite the fact that the period before the year 1871 had been one of rapidly rising prices and that wages always tend to lag behind prices during such a period, the employers claimed that their profits for that year (1871) were "fair" and "normal." To this the miners

[3] Webb, *op. cit.*, vol. I, p. 229.

[4] *Report of the South Yorkshire Collieries Arbitration*, p. 49.

objected. They asserted that the policy declared by the operators would force the employees to shoulder all the consequences of an adverse market. They denied that the profits in 1871 were normal and challenged the operators' main contention that the prices of coal must fluctuate "in exactly the same ratio as wages in order that the profits of coal owners may remain the same."[5]

The arbitrator in his decree in this case discarded all the principles advocated before him and made the award on a wage-fund basis, a curious promiscuity of principles supposed to govern wages. He found that wages had increased since 1871; that prices had fallen. A reduction of wages of from 10 to 12½ per cent was awarded, but not because the current of prices was failing to keep abreast of the increase in wages. The arbitrator found that the number of men in the industry had increased. Where there were now fourteen men there had been formerly but ten. From the "total wages fund" he found therefore that each man could expect only one fourteenth instead of one tenth. The award concluded:[6] "The restoration of economy in production cannot be brought about by abating the rate of wages only, or indeed mainly, but must be accomplished by reducing the number of men."

During the next twenty years the emphasis shifted to the principle of the sliding scale: that wages should be determined by prices. The settlement of the proper basis and the administrative details of such a scheme occasioned in many industries frequent resort to arbitration. The inherent tardiness with which wages followed prices was a constant source of aggravation to employees during periods of rising prices and to employers during periods of stagnation or of depression.[7] The great stimulus to industrial arbitration and the extension of the method of compulsory award have come, however, during the last generation, from the advocacy of the "living" or minimum wage as a first charge upon all industry. The unionist promulgators of this doctrine in England, in America, and in the British possessions, prompted by ideals of general social welfare tempered some-

[5] *Miner's National Record,* vol. VII, pp. 108, 109; reprint.

[6] *Ibid.,* p. 109; also *cf. seq.*

[7] A. E. Suffern, *Conciliation and Arbitration in the Coal Industry of America,* pp. 278, 279.

what with class-consciousness, failed to take account of the economic principle that in the long run general wages are fixed by prices and not prices by wages. Yet the minimum wage, in so far as any such has existed, has been the guiding principle in much of the recent wage arbitration, especially in Australasia.

The indiscriminate way in which wage theories have been taken up and discarded is attested by the recent American arbitration, instituted in 1910 under the provisions of the Erdman act, between the Order of Railway Conductors and the Brotherhood of Railroad Trainmen as appellants and the Baltimore and Ohio Railroad as appellee. This action resulted in the well-known Clark-Morrissey award, the terms of which were subsequently extended to most of the railroads in the Eastern territory. The unions in this case, as also in the similar case three years later against all the Eastern railroads for a still further increase, demanded rates of pay equal to those paid in the Western territory. These were almost uniformly higher:

(a) In the name of standardization (*i.e.*, to abolish the differential);
(b) On account of increased cost of living;
(c) On account of increased risk, labor, and responsibility;
(d) On account of the increased productivity of the work of the train crew;
(e) On the ground that the profits made by the railroads in recent years have increased out of proportion to wages.[8]

The unions urged the abolition of the differential between the West and the East on the general grounds that "railroading *per se* is worth just as much in one part of the country as in another."[9] A minor exception was recognized in the case of the Rocky Mountain territory.

The argument of the unions thus embraced a miscellany of wage theories: (a) a "cost of service" theory, involved in equal sacrifice; (b) a "standard of living" theory; (c) a conglomeration of "risk," "sacrifice," and "value" theory; (d) a "productivity" theory; and (e) an "opportunity" theory, on the ground that the fruits of prosperity should be distributed. The railroads contented themselves with contesting the claims of the unions. No new wage theories were added by them to the list. How much the arbitrators were impressed by the wage principles addressed to them is shown in the statement of the

[8] *Award*, p. 11.
[9] *Ibid.*, p. 11.

theory underlying the award that "the employee will be paid for all the service he renders, and the company will not pay for any service that it does not get."[10] In the later award of 1913, involving the Eastern railroads, the arbitrators stated that, although they did not found their action entirely upon the increased cost of living, they regarded it as basic.[11]

These instances are only illustrative of the non-success of arbitration precedents in establishing, after a generation's experience, uniform theoretical standards for the adjudication of wage controversies. Narrowly economic considerations have been confused in the presence of broadly social considerations, and public welfare with the class-conscious representations of employees and of employers.

The conditions which confront the industrial arbitrator are complex and often embarrassing. Finding no generalized precedents he is compelled to adopt such unsatisfactory rules of procedure as may seem suitable for the immediate case. He is furnished with conflicting data. Often none of the evidence is of disinterested origin. The arbitrator can not isolate the precise share of the value of the joint product that is imputable to labor, nor can he determine the value product specifically attributable to the capital. Of serious help he gets none from the socialist who tells him that labor *produces* the entire product. But little more is had from the economist who assures him that the laborer produces what he gets.

Failing to secure from these sources any workable criteria, he falls back upon the general principles of distributive justice. But even here the perplexities are scarcely diminished. The arbitrator must determine, for example, whether the industry can afford to pay the increased wages that are demanded. Clashing interests do not encourage agreement on such a question. What are "fair" wages? "fair" profits? Is the rate of profits, once it is determined, to be applied to the par value or to the market value of the securities or to some other base? Or may the arbitrator use his office to knock the water out of inflated corporate issues? Shall the basis of rate determination be the actual investment in the enterprise? or shall allowance be made for subsequent changes for example in the general price level? or the cost of reproduction of the plant? Is good-will

[10] *The Clark-Morrissey Award*, p. 210.

[11] *Award*, p. 34.

entitled to profit? If so in what proportion? The capitalization of an elastic, intangible asset, such as good-will, can easily be construed (as it unfortunately too often is construed) into a social or ethical justification of the income itself from which this capitalization is derived. Against such a form of question-begging the arbitrator has often found difficulty in defending himself.

Even after these issues have been settled and the conflicting interests appeased the arbitrator finds that profits vary with the several firms. The award involves, therefore, the determination of the right and the expediency of maintaining in the field the least efficient producers, whom the compulsory payment of higher wages will drive out. Moreover, the arbitrator can not estimate the practicability of shifting the higher wages to consumers in the form of higher prices. As an impartial outsider, he does not know the business intimately. Even if he did know it he could not forecast results with assurance. The extent to which an increase in wages can be shifted depends upon the character of the product involved; the availability of substitutes, the elasticity of the demand for it, whether the initial price was or was not a monopoly price, and kindred considerations.

It is small wonder that the Anthracite Coal Commission, acting in 1902 at the instance of the vigorous and withal the doubtfully legal executive action of President Roosevelt, declined to listen to testimony concerning the ability of the several companies to pay the wages demanded. It could not have satisfied itself, nor the employers, nor the miners. The task of the commission was the restoration of industrial peace. To this task it addressed itself. Upon the companies devolved the responsibility of accommodating their business to the terms of the award. The settlement was, however, an avowed makeshift. The agreement was extended from 1912 for an additional four years expiring March 31, 1916.

This brief catalogue of some of the important issues shows how impracticable must be the judicial determination of an award or of a series of awards uniformly consistent with the principles of distributive justice. In practice, in most cases and in most countries, the umpire has abandoned the quest for a theoretically defensible decision. He often claims that he is confronted with a situation and not with a theory. Demands and counter-demands he finds; assertions and denials; complaints and defenses. These

are tangible. It is impossible for both parties to be right; nor can either be shown to be wrong. In actual wage arbitration practice in Australia, Europe, and America the most widely used formula has been, "split the difference." That this is so is the familiar impatient criticism thrust at the Erdman act in the United States. This eclectic process meets with inevitable disapprobation from one side or from both. It has been the frequent cause of public ridicule of the judicial methods of industrial peace. In doing substantial justice to both parties the arbitrator does strict justice to neither.[12]

As an instrument for the distribution of the social income, arbitration has few consistent theoretical defenses. Yet practically all important awards have involved directly a wage theory of some sort which can be isolated. Mr. Justice Higgins, the president of the Australian Arbitration Court, in deciding the mine workers' dispute in 1908 elaborately discussed the grounds for the award of increased wages:[13]

> Now, the first condition in the settlement of this industrial dispute as to wages is that, at the very least, a living wage should be secured to the employees. I can not conceive of any such industrial dispute as this being settled effectively which fails to secure to the labourer enough wherewith to renew his strength and to maintain his home from day to day. He will dispute, he must dispute, until he gets this minimum. . . . Nor do I see any reason yet for modifying my view of a living wage as expressed in the Harvester Case (2 Comm. Arb. Rep.) and in the Marine Cooks' Case (2 Comm. Arb. Rep.). In finding the living wage I look, therefore, to find what money is necessary to satisfy the normal needs of the average employee regarded as a human being in a civilized community.

To this theory of the "living wage" based on the prevailing standard of living, the Australian court has tenaciously held. Asserting that the requirement is primary of a wage sufficient "for the healthy subsistence of an average family," the court in the Barrier Miners' case continued:

> First of all, is an employer who is poor to be ordered to pay as high wages as the employer who is rich? Now, without laying down a rule absolute and unconditional under all circumstances, I strongly hold the view that, unless the circumstances are very ex-

[12] Because of general dissatisfaction with this unscientific method of splitting differences, England has attempted to require in a large category of disputes a Yes or a No, as in the courts of law, with no attempt to palliate both sides.

[13] *The Barrier Branch of the Miners' Association Case*, 1908, p. 13.

ceptional, the needy employer should, under an award, pay at the same rate as his richer rival. It would not otherwise be possible to prevent the sweating of employees, the growth of parasitic enterprises, the spread of industrial unrest—unrest which it is the function of this Court to allay. If a man cannot maintain his enterprise without cutting down the wages which are proper to be paid to his employees—at all events, the wages which are essential to their living—it would be better that he should abandon the enterprise.

Mr. Justice Gordon, in the Brushmakers' case in Adelaide, said: "If any particular industry cannot keep going and pay its employees at least 7s. a day of eight hours, it must shut up." In the Collie Miners' case Mr. Justice Burnside refused the application of the employers that the minimum wage be lowered: "If the industry cannot pay that price it had better stop, and let some other industry absorb the workers."[14]

Again Mr. Justice Higgins defined the positive significance of the living wage theories in arbitration: "It is necessary to keep this living wage as a thing sacrosanct, beyond the reach of bargaining. But when the skilled worker has once been secured a living wage, he has attained nearly to a fair contractual level with the employer, and, with caution, bargaining may be allowed to operate."[15]

These excerpts represent the recent attitude of the important Commonwealth Arbitration Court of Australia. Its jurisdiction under the act of 1904 extends to the determination of wages, but only in those cases in which interstate interests are involved.

The act providing for compulsory arbitration in New South Wales was passed in 1901. It was copied from the New Zealand law and its primary purpose was to stop strikes. In a letter to the special labor commissioner of the state of California, Mr. Justice Hayden of the Arbitration Court seriously questioned the wisdom of any compulsory substitute of collective bargaining:

> If there are weak classes to be imposed upon . . . and to whom it is in the highest degree just that a fair living wage should be awarded, there are also strong unions able, without the assistance of any tribunal, to win for themselves wages which rise as far above a fair living wage as those of the sweated classes fall below it. To take away from those men the weapon of the strike, and to impose upon them the compulsion of a peaceful award is to enter at once upon difficulties of the gravest character.[16]

[14] 6 W. A. Arb. Rep. 84, pp. 17, 18.

[15] *Ibid.*, pp. 18, 19.

[16] *Fourth Annual Report of Special Commissioner of Labor of the State of California*, pp. 3, 4.

Whatever may have been the result in levelling down high wages, there can be no doubt that the levelling up of low wages in New South Wales has been even more apparent. In 1909, one year after the passage of the Industrial Disputes act, which, by the erection of "industrial boards" to determine the conditions of employment in specified industries, reinforced the terms of the Compulsory Arbitration act of 1901, the director of labor reported:

> The opinion is fast gaining ground in industrial circles that greater benefits are likely to accrue from the operation of the Act than could be expected from the methods of strikes. Strikes are rarely successful in obtaining all that is demanded, settlements being usually in the nature of a compromise. . . . Nor is this all. There are many of the smaller and less compact industries in which the operatives could hope for nothing whatever from a strike. . . . But under the Act they are in as good a position, and have equal opportunities with the largest and strongest Trades Unions.[17]

Apparently arbitration has here had the effect essentially of increasing the bargaining power of the weaker unions in the presentation of their claims to the court. The institution in 1908 of the industrial boards gave extended jurisdiction over industrial conditions even before actual disputes had arisen.

It is interesting to note that the Department of Labour of New South Wales has found many more embarrassing complexities arising out of its attempts to secure standardization of wages in an industry than have been admitted by the Commonwealth Arbitration Court of Australia, cited above.[18] The industrial conditions antecedent to the passage of the Compulsory Arbitration act of 1908[19] are described in the report for 1908-1909 of the Minister of Labour of New Zealand, in paraphrase:

[17] See *Report of Director of Labour to the Minister of Public Works of New South Wales,* 1909, pp. 2 ff.

[18] *E.g.,* Mr. Justice Higgins, in the miners' case referred to above, said: "It is not difficult to see the danger to industrial peace involved, when workmen performing the same work, with the same skill, in the same city, are not receiving the same remuneration. So that when the . . . Company ask me to fix by my award wages lower than are proper for the industry as a whole, and adduces as its reason the fact that its mine is now poor, and is becoming poorer, I cannot discern either justice or expediency in the request" (6 W. A. Arb. Rep. 84, pp. 18, 19).

[19] Voluntary arbitration had been introduced into New South Wales in 1896. Its total inadequacy led to the adoption in 1901 of the compulsory principle in an act due to expire by limitation on June 30, 1908. In 1908

Without question the arbitration act had excited disfavor. Even discounting the expressions of disapproval of chronic industrial malcontents the act was disagreeable to the great solid silent body of laborers. The executive practice of granting permits to work below the legal minimum wage and of granting exceptions to the operation upon employers of the terms of the award, the desirability of restoring function to conciliation boards, of terminating awards where strikes against the awards had taken place, of authorizing the Court to decline to make an award—these and other influences necessitated a considerable change to conform the law to modern opinion.[20]

The administrative privilege and the elasticity allowed under the old act of 1901 were the chief causes of its comparative failure. The extension in 1908 of the principle of compulsion,[21] both as to reference and to award, to the determination of the conditions of employment in specified industries as well as to the determination of active disputes referred to it, has corrected many of the former inadequacies. The powers of the court and the range of their application have been much strengthened by the recent Industrial Arbitration act of 1912. The grounds for compulsion in New South Wales were plainly of a broad social and political character. Apparently no defense argued for the passage of the act indicated that its sponsors were concerned with or interested in its compatibility with consistent wage principles.

The initial guide in wage arbitration as practiced in Australasia has been the living wage to the industrially fit. This wage is held to be a prior lien on the income of industry. The courts have occasionally admitted that for the workers it constitutes only the starting point. The men demand the living wage *plus* as much more as they can secure. This is a relapse to a value basis after all. The second principle is practicability: the wages bill must not be more than the industry can permanently absorb.[22]

was passed the Industrial Disputes act. Victoria inaugurated the wage board system in 1896; followed by South Australia in 1900; Queensland in 1908; Tasmania in 1910. Compulsory arbitration was adopted in 1902 by Western Australia and in 1904 by the Commonwealth of Australia.

[20] Pp. 2, 3, *et seq.*

[21] It is to be noted that even this compulsory arbitration act permits under very strict supervision, the payment of less than the legal minimum to old men and to incompetents because these are not "worth" the minimum to the employer. The value theory of wages is here finally lugged in at the back door.

[22] The practice of New Zealand has not evidenced so clearly as has that of the Commonwealth Court of Australia the principle of submerging the

Third, the workers usually demand much more than they expect to get. The resulting practice is the compromise, to which attention has already been directed. Fourth, the minimum wage established by arbitration tends to become the standard wage.[23] The economic theory of compulsory arbitration as abstracted from the New Zealand precedents has been ably reviewed by Le Rossignol.[24] As applied to the discussion of wages, the principles there defined may be framed in the following paraphrase: The competitive system and collective bargaining have resulted in low wages, sweating, and strikes. Under the sweating system the worker receives less than a decent living wage. By the method of the strike, force prevails over justice. Strikes and other forms of industrial warfare discommode the public. Such industrial methods should be eliminated by an impartial judicial determination. This has usually taken the form of a legal minimum wage.

But if the standard wage is attributed to the proficient worker, what provision is to be made for the superannuated or, more especially, for the relatively unemployable? Such are not "worth" so much to the entrepreneur. Can the principle of the value of service to the employer and the principle of a fixed legal minimum wage be reconciled? These considerations[25] lead to the circular reasoning with which industrial arbitration has been charged:

1. The living wage is relative to the economic position of the wage-earner.
2. The economic position of the wage-earner depends upon the wage which he has been receiving.
3. The wage which he has been receiving depends upon the value product attributed to the worker by the entrepreneur.

industry which cannot afford to pay "fair" wages. The latter looks to the elimination of this form of industrial parasitism.

[23] M. B. Hammond, "The Australian Experience with Wages Boards," in the *Survey,* Feb. 6, 1915, p. 12.

[24] "Compulsory Arbitration in New Zealand," in *Quarterly Journal of Economics,* vol. XXIV (1910), pp. 682, 683.

[25] Among other social considerations are: The living wage "fair" for a single man is insufficient for the married man. Is the state therefore to regulate marriage and the number of children? Or is the married man to have a higher wage than the single man? Then which one will "hunt" for a job when times become less prosperous? But the protection of which one is the more important socially? *Cf. ibid.,* pp. 684 ff.

The living wage theory, distinct from a value wage theory, thus defined and applied, is a begging of the question.

In venturing an estimate of the merits of compulsory arbitration it must be noted that our laboratory has been confined, in the main, to Australasia. Differences in industrial development between countries may be adequate to nullify conclusions drawn from so limited territory. The comment of the *London Morning Post* of September 20, 1911, is perhaps not wholly inappropriate or unwarranted:[26]

> In theory the idea of making arbitration compulsory, and depriving employers and employees of the right either to lock out or to strike is attractive to autocratic minds. . . . The enforcement of any such law upon large bodies of disgruntled workmen is absolutely impracticable. To draw any analogy between the tiny disturbances of a new country like New Zealand and the Titanic upheavals among the crowded millions of Britain's industrial workers is absurd.

Admitting, therefore, that its experience is not conclusive upon the other countries, the result[27] of the Australasian experiment with wage arbitration may be summed up: (1) The wages system has tended to rigidity. The direction of development has been from contract to status, or the exact reverse of Sir Henry Maine's juristic ideal of human progress. (2) The marginal, the most inefficient, entrepreneurs have obstructed wage increases. The New South Wales Court, unlike the Commonwealth Court of Australia, has usually made concessions to them. The unions, however, have urged the ostracism of such inefficiency as unfit for survival. (3) Wages during twelve years ending in 1907 increased 24 per cent; food prices during the same period increased 22.5 per cent. In only a few cases has an industry been unable to absorb its wages outlay as fixed by arbitration.[28] (4) Manufacturers are substantially agreed that compulsory arbitration has increased the costs of production. This can not, however, be accepted as conclusive, since the entire period under observation has been one of generally rising prices. Dr. Victor

[26] Quoted in Bulletin of the United States Bureau of Labor, No. 98 (Jan., 1912), pp. 177-178.

[27] *Cf.* Hammond, *op. cit.*, p. 18.

[28] This is the official claim of the colonial parliament of New Zealand: "We can only add our personal testimony to that given by every careful investigator into the circumstances of New Zealand, that there is so far no evidence of injury to its industrial prosperity." (*Industrial Democracy*, 1902, p. xlvii.)

S. Clark, formerly of the United States Bureau of Labor and a careful student of state experiments in Australasia, ventured the conservative opinion in this matter that "All regulations restricting the freedom of employers in conducting their business probably add to the cost of production."[29] A well-known arbitrator, since the passage of the compulsory law in 1894, stated that "with possibly one exception, industries have not been hampered by the provisions of the act."[30]

It is a significant fact that wages in Australasia during much of the recent period of rapidly rising prices have increased, contrary to the general rule, as rapidly as, and during some years more rapidly than, the cost of living has increased. Of course this condition in the distribution of income has increased the workers' buying capacity in local markets; and so contributed to general high prices. These rising prices may yet prove to be a stumbling block. The farmers of New Zealand, for example, sell their goods in the foreign markets, competing with similar goods produced in other countries where the wages bill is relatively less heavy. What will be the effect upon arbitration awards, when the farmer finds the prices of his goods limited by foreign competition and himself nevertheless compelled to pay increasing prices at home, is problematical.[31]

It has been often intimated, as has been pointed out above, that ordinary arbitration precedents have been drawn from extraordinary industrial conditions, such as have existed in Australasia. In the main this is true. There have been numerous instances, however, which afford clue to the applicability of the principles of arbitration to American industrial society. A legitimate basis of comparison may be found in the "certain well-defined principles" governing the wages determination in the dispute in 1911 between the Western Coal Operators' Association and District No. 18 of the United Mine Workers of America:

1. A living wage is a necessity.
2. In mines operating under the same association and within

[29] *The Labor Movement in Australasia, 1906,* p. 233.

[30] Judge A. P. Backhouse in *Report of Royal Commission of Inquiry into the Working of Compulsory Conciliation and Arbitration Laws,* Sydney, N. S. W., 1901, p. 15.

[31] Complaints of this character have been made in Australia and more recently in New Zealand. *Cf. Report of Victoria Commission on Operation of Factories and Shops Law of Victoria,* 1903, p xxvi.

the jurisdiction of the same labor union, uniformity should prevail as far as possible.

3. In the same mining camp equalization of wages should be sought. After passing the limit of the living wage the financial standing of the company should be considered.[32]

One of the serious flaws in the theory of wage arbitration is here in evidence. The fallacy is not as unusual one. It is proposed that there be equalization of pay. In the long run this can be achieved only by means of an equalization of effort. Practice—and there are many instances of this, for example, in recent New England industrial history—has indicated that such a policy involves a process of levelling down of skill. To so dangerous a program even the ardent arbitration enthusiast must hesitate to lend his assent.

The fundamental general principle underlying industrial wage arbitration has been that of the living wage. Grounded in social policy, the living wage, usually in the form of a legal minimum wage, has found its strongest support among the wage-workers. Primarily interested in social results, the wage-earner finds[33] only minor concern in the immediate or direct economic effects, except in so far as they too alter the broadly social effects. The employers, the entrepreneurs, charged with the responsibility of the right proportioning of factors, of the proper distribution of capital, of the many technical adjustments incident to modern industry, generally have opposed as uneconomic, compulsory wage arbitration especially when the award has taken the form of a fast legal minimum wage.[34] The arbitration precedents estab-

[32] E.g., *Report of Arbitration Board in Case of Grand Trunk Railway v. Its Telegraphers, 1908.*

[33] English wage-earners on the whole favor the plan of arbitration. The opposition is mainly that of the strong unions, which expect to win more by direct methods. The points of their criticism are tersely stated:

"Too many conciliations end with a compromise which looks like six of one and a half dozen of the other; . . . . Clean-cut, straight-forward, cold-blooded business recognition of trade unions is worth volumes of arbitration schemes. . . . We like peace, we want peace, we'll have peace if we are bound to fight for it." (Bur. of Lab. of U. S. Bull., No. 98, pp. 184, 185.)

[34] The opposition of English employers to the scheme of voluntary arbitration as provided mainly in the act of 1896 has been crystallized into three chief particulars.

First, the judges, trained in the courts of law to decide cases on their

lished by the Commonwealth Court of Australia have been generally consistent with the fundamental underlying principle. By charging the individual employer with the responsibility of so setting his industrial house in order that he can meet the charge imposed by the general wage award, it has, by policy, encouraged the survival of the industrially fit. "Let him save himself who can; and the devil take the hindmost." Exceptions to the awards have been more customary in New South Wales where the "normal" wage-worker is the standard, and to a less degree in New Zealand. The tendency to grant such relief from the award has been in direct proportion to the acceptance, in practice, of a value theory of wages.

In the individual states of Australia, as distinguished from the commonwealth, the judges have persistently disclaimed any profit-sharing principle for their wage decisions. General consideration has been given, under the system of wage boards which prevails in many of the states, to changes in cost of living. Custom has featured somewhat in many of the decisions. The immediate guiding principle, however, as distinguished in general from the arbitration precedents reviewed in this paper, where the living wage has been most rigorously enforced and concessions begrudged, has apparently been to "charge what the traffic will bear." This return to value terms is expressed in the following principle underlying an award by Judge Heydon of the Court of New South Wales (by which the principle of the living wage has been the less rigidly enforced), that the men are given what in the court's opinion they might have secured without a court, considering their own strength and the resisting power of their employers.[35] Stated otherwise, the court's gauge has been the amount which the court thinks that the union could have wrenched from the employer had it resorted to the direct methods of the collective bargain or of the strike. But the general complaint of employers in Australasia has been that the fixation of a

merits and not on grounds of expediency, are apt to bring to arbitration the ironclad principles of the formal law. Second, the arbitrator because he does not have the responsibility of entrepreneurship can afford to generously indulge his social sympathies at the expense of the employer. Third, a serious objection is the tendency to "split the differences." The workers put their demands unwarrantedly high. The arbitrator reduces them one-half and naïvely congratulates himself upon his ingenuity.

[35] P. Kennaday in *Yale Review*, vol. XIX (1910), p. 41.

minimum wage by state arbitration, and especially by the wage boards, has compelled the entrepreneur to lower the wage of the more efficient to compensate for the higher wages of the less efficient. The employers have often naïvely asserted that this process of general levelling down along with the generally levelling up has been necessary so that the total wage budget might be in the "proper" or "former" relation to profits. The minimum wage has thus tended to become in fact the standard wage.[36]

Finally, it is to be noted that in many states where arbitration practice has been most highly developed the state has challenged the ethical and social justification of existing incomes. It has been unwilling to accept the *status quo* as a necessarily valid starting point. Unadorned economic theory does not always follow through the labyrinth of social amelioration. Theories of distribution give way to ulterior considerations of immediate social policy. The state of Victoria is definitely committed, for example, to the doctrine that the government shall enforce the right of the workers to a legal living wage. The New Zealand law and the precedents built upon it commit the state to the vastly more comprehensive policy of the redistribution of the income from private industry. The same is true of Western Australia. This program does not appear today as the *inevitable* outcome of a policy of compulsory wage arbitration. It is fair to say, however, that such has been the positive tendency in the great laboratory of modern social legislation, where the judicial methods have become almost universalized in the settlement of industrial disputes. And it seems needless to point out that the precedents of wage arbitration have been in the interests of the human being, the individual worker, rather than in the interests of industry for its own sake. It is not our task here to enter upon a consideration of the validity of such a distinction. The principles underlying wage arbitration have become not an economic theory of distribution but a social theory of *redistribution.*

[36] Professor Hammond has pointed out the important difference between the wage fixed by a wage board and the wage fixed through compulsory arbitration. The former, made compulsory, as a minimum, upon the employer but not upon the employee, is not a standard and still less a minimum wage. The latter, made compulsory alike upon employer and employee, tends to become the standard wage. Accordingly, the essential difference between the wage board plan and collective bargaining is that in one case the bargaining is compulsory; in the other voluntary.

Among modern social students there has been a wide difference of opinion as to the theoretical merits of arbitration as a device for wage settlement. The persistent division of sentiment has made the subject one of frequent controversy.

Mr. S. N. D. North, in 1896, gave expression to what is perhaps the fundamental fallacy of the theories of wages in industrial arbitration:[37]

> The question whether wages ought to follow prices, or prices wages, is one which boards of arbitration cannot determine. . . . We may resolve and protest and insist, but it still remains the fact that the living wage is only possible under conditions which allow the living price. This is the A B C of industrial economics. . . . That is the inexorable law which trade unionism cannot repeal. If the wage could make the price, it would never fail to do so. . . .

To the many questions propounded in the statement of the problem of the wage theories in arbitration there is found in the precedents no adequate answer. As a method of industrial peace, arbitration is intermediate, not final; corrective, not remedial; opportunist, not ideal; an expedient for which the defense is to be found in present social policy. From the narrowly economic point of view as contrasted—if such contrast be permissible—with that of general social welfare, wage doctrine in industrial arbitration is as lacking in theoretical justification as is the legal minimum wage, the usual product of arbitration in practice. There is a fundamental circle in the reasoning; throughout, a begging of the question. It takes its place with the other cost-of-production theories of distribution. In judging, however, the usefulness of compulsory arbitration as a device for the maintenance of industrial peace the reminder may not be inappropriate that the "business of the labour arbitrator is not to please orthodox professors of economy, but rather to find a reasonable *modus vivendi* for two disputants who are unable to find it for themselves."[38]

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[37] "Industrial Arbitration; Its Methods and its Limitations," in *Quarterly Journal of Economics*, vol. X (1896), p. 415.

[38] W. P. Reeves, *State Experiments in Australia and New Zealand*, vol. II, p. 169.